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IN THE SUPREME COURT OF
THE UNITED STATES

No. _____

ROBERT CASPER BISPING,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE
FIFTH CIRCUIT

Petitioner, Robert Casper Bisping, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia entered in the above styled case on 2 January 1976.

OPINIONS BELOW

No opinion was rendered by the Circuit Court of the City of Norfolk, Virginia, the trial court, nor was an opinion denying the petition for appeal issued by the Supreme Court of Virginia.

JURISDICTION

The judgment of the Supreme Court of Virginia was issued 2 January 1976 denying the petition for appeal.

Petitioner has no further appellate remedy under the laws of the State of Virginia.

The jurisdiction of this court is invoked under Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED

1. Was petitioner's right to be secure against unreasonable search and seizure as guaranteed by the Fourth Amendment to the Constitution of the United States violated when the affidavit for probable cause recited as facts only that a police officer had obtained from a commercial film processor photographs showing petitioner engaged in acts of oral sodomy with two female juveniles and that the petitioner had a prior police record with the Norfolk Police Department for similar crimes which have occurred in the past without any showing of when the pictures had been obtained or that the pictures or any other evidence indicated any similar pictures or other evidence of acts of sodomy were on the premises to be searched and where there was no showing recited as to when or where or under what circumstances any similar acts in the past may have occurred.

2. Did the Court err when it failed, for the purpose of sentencing, to combine

those offenses which arose out of substantially one act of criminal misconduct into the single most serious of these offenses.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Fourth Amendment to the Constitution of the United States.

2. Fifth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

I. Procedural History of the Case

Petitioner was indicted for violations of the Virginia Statutes in thirteen separate indictments involving felonies of fondling, exposure, enticement and sodomy with juveniles.

Petitioner moved to supress evidence obtained from petitioner's home by the police pursuant to a search warrant which motion was on 10 March 1975 overruled.

Petitioner was arraigned, pleaded not guilty to each charge against him, waived trial by jury in each case, and was tried on 18 March, 6 May and 26 May 1975. Over his objections, evidence obtained in the search of petitioner's home was admitted in evidence against him. The evidence admitted related to indictments 2, 4, 5, 7, 8, 21 and 24. The court made findings of guilty on thirteen of the indictments and on 24 June 1975 a presentencing report was

submitted. The court sentenced the petitioner to confinement in the penitentiary on each of the thirteen indictments and specifically provided the punishment on indictments 4, 5, 10, 11 and 12 would be served consecutively for a total consecutive punishment to confinement of twenty years. Confinement on the other eight charges was ordered to be served concurrently.

Petitioner filed a petition for appeal in the Supreme Court of Virginia which on 2 January 1976 refused to grant a writ of error, the effect thereof being to deprive the petitioner of a right to appeal and there is no intermediate appellate court in Virginia. Petitioner has no further remedy for appellate review in the state courts of Virginia.

II. Facts Material to the Questions Presented

On 14 October 1974 Detective Masterson of the Norfolk Police Department responded to a call from the Manager of Fotomat Corporation (a film processor) at 7460 Tidewater Drive, Norfolk, Virginia. There the manager presented the detective with developed photographs which showed a man and some female children engaging in acts of sexual misconduct, including an act of sodomy. Eight of these photographs were subsequently introduced into evidence as Exhibit C-2 through C-9. The persons in the photographs were later identified as the petitioner, Barbara Velonza and Cheryl Jean Fortner.

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Detective Masterson took possession of the photographs together with the negatives and the envelopes in which the negatives had been submitted for development by the customer. The name of the customer on the envelope was "Bisping, R. C."

Detective Masterson looked up the address of Bisping in the telephone book and went to that address. He inquired of Mr. Bisping, located his residence, and saw Mr. Bisping, who he recognized only through the photographs, and apprehended him in a nearby parking lot for the offense of sodomy.

Detective Masterson, at the time of the arrest, advised the petitioner he wanted to enter petitioner's house, but petitioner told Detective Masterson he could not enter the house without a search warrant.

Detective Masterson then went to the Second Precinct and arrived there around 2:45 p.m., some 30 minutes to an hour after the arrest of the petitioner. He prepared and executed an affidavit for a search warrant of petitioner's home and submitted it to the Magistrate who issued a warrant for the search of petitioner's home for "obscene materials, msteriala and photographs" for violation of Sec. 18.1-213, Virginia Code (sodomy).

The affidavit for the search warrant states with respect to probable cause, "I received from Fotomat Corporation, 7460 Tidewater Drive, pictures they developed for Robert C. Bisping in which Robert C. Bisping was engaging in

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acts of oral sodomy with two white female juveniles. This defendant has a prior record with the Norfolk Police Department for similar crimes which have occurred in the past, I believe additional photographs of acts of sodomy will be found at the place to be searched."

A search on 14 October 1974 of petitioner's home was conducted pursuant to the search warrant and various materials seized of which Exhibits C-1, C-2 and C-3, which were photographs involving the petitioner with Michael Hamm, were subsequently received in evidence. Exhibits C-10 and C-13 through C-20 involving the petitioner and Kimberly D. Persinger and Penny Jo Fortner were subsequently received in evidence.

Using only those photographs seized in the search of petitioner's house, Detective Masterson was able to establish the identity of Michael Hamm. Following this identification and contact with Michael Hamm, charges resulting in conviction under indictments 7 and 8 were initiated against accused.

After the search of petitioner's home and seizure of photographs, Detective Masterson contacted Barbara Velonza and through the photographs was able to identify and subsequently contact Penny Jo Fortner and Kimberly D. Persinger, who were in pictures he had seized in the search of petitioner's home. From this information and the investigation it indicated charges against the petitioner were initiated which subsequently resulted in his conviction on indictments 2, 4, 5, 21 and 23.

The facts which were submitted in support of indictments 10, 11 and 12 all relate to a single continuous incident involving Cheryl Fortner which occurred in Apartment F in July or August 1974. Cheryl Fortner was the alleged victim of sodomy, enticement, and exposure in these indictments.

The testimony of the victim, Penny Fortner, which was the sole evidence related to indictments 2 and 5, concerned a single continuous incident in the home of the petitioner.

ARGUMENT

A. Certiorari should be granted because there was a lack of probable cause in the affidavit submitted for the search warrant in violation of the requirements of the Fourth Amendment of the Constitution of the United States.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The question submitted is whether

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the requirement of probable cause to search set forth in the Fourth Amendment to the Constitution of the United States was met regards the search by the Norfolk police officers of the home of petitioner on 14 October 1974.

In Nathanson v. United States, 290 U.S. 41, 78 L.Ed. 159, 54 S.Ct. 11 (1933), an affidavit for a search warrant under the Tariff Act of 1922 contained mere affirmation of suspicion and belief without any statement of adequate supporting facts. The Court states at page 47:

> "Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling house unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough."

At pages 13-14 this court in Johnson v. United States, 333 U.S. 10, 92 L.Ed. 436 (1948), discussed the application of the Fourth Amendment to a determination of probable cause to search as follows:

> "The point of the Fourth Amendment, which oftern is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from

evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warranty would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual, but to a society which choses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonable yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policement or Government enforcement agency."

In the affidavit submitted by Detective Masterson, which is the basis of the probable cause to issue the search warrant, it is alleged "additional

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photographs of acts of sodomy will be found at the place to be searched." Such statement is not a statement of fact or of a circumstance and is simply an opinion of the detective. It adds no weight to the establishment of probable cause and is the very evil which the court in Johnson v. United States, supra, pointed out must be avoided if rights under the Fourth Amendment are to be assured. The magistrate, not the police officer, must make the determination that "additional photographs of acts of sodomy will be found at the place to be searched" for that conclusion is the very judgment which the magistrate is exclusively entitled to make in the issuance of the search warrant. Aside from this opinion of the police officer, only two facts are set forth in the affidavit requesting the issuance of the search warrant.

The first fact alleged by Detective Masterson was, "I received from Fotomat Corporation, 7460 Tidewater Drive, pictures they have developed for Robert C. Bisping in which Robert C. Bisping was engaging in acts of oral sodomy with two white female juveniles." There is no statement as to when the pictures had been received from Fotomat Corporation. There is no statement that would indicate when the photographs were taken. There is no statement of where the photographs had been taken. As far as the facts alleged in the affidavit are concerned, these photographs could have been obtained from Fotomat Corporation ten years ago or at any other time. Additionally, the photographs could have been of acts

performed at any time in the past twenty years. Additionally, there is no statement in the affidavit which could link these photographs to the home to be searched. It is not alleged the photographs showed the inside of petitioner's home or that there was any factual basis to believe they were a part of a series of photographs from which a reasonable magistrate could conclude other photographs of the petitioner engaging in acts of sodomy would be found in the premises to be searched.

Thus, the facts alleged regarding the photographs fail to meet the requirement of time or the broader requirement of probable cause to search. In discussing probable cause to issue a search warrant, the Circuit Court of Appeals, Sixth Circuit, in Staker v. United States, 5 F.2d 312 (1925) at page 314, stated:

> "Furthermore, although in fact the affidavit was made immediately after the facts were discovered, the affidavit itself is silent as to the time element. So far as the affidavit shows, the officer might have smelled the fumes months before the affidavit was made. See Rupinski v. United States, 4 F.(2d) 17 (C.C.A. 6), February 4, 1925."

As to the requirement that the affidavit show the relation in time of the facts alleged to the evidence sought by the search see Poldo v. United States, 55 F.2d 866 (1932); Chin Kay v. United States, 311 F.2d 317 (1962); North

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Carolina v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972); Welchance v. Tennessee, 173 Tenn. 261, 114 S.E.2d 781 (1938); Messer v. Kentucky, 350 S.W.2d 486 (1961); and Waggener v. McConless, 191 S.W.2d 551 (1946). Webb v. Kentucky, 339 S.W.2d 177 (1960) states at page 178.

> "The instant affidavit failed to set or fix any date or period of time when the alleged facts occurred. The law is well settled that a failure to state any date or time when the purported facts set forth happened renders the affidavit insufficient to create probable cause for the belief that the forbidden articles were possessed at the time the affidavit was made. Therefore, since the affidavit under attack was fatally defective, the search warrant issued pursuant to it was void. (citations omitted)"

The second and only other factual statement to support probable cause contained in the affidavit was the statement that petitioner "has a prior record with the Norfolk Police Department for similar crimes which have occurred in the past." These similar crimes are not identified either by date, place, victims, or police or court disposition. As far as the magistrate could tell from the affidavit before him, these prior similar crimes could have involved incidents which occurred ten, twenty, or thirty years ago. Their, relevance to the establishment of the probable cause on which to issue a

search warrant for "obscene materials, msteriala and photographs" in the home of the petitioner is not established by an allegation of a past record. If this were so, then police officers could obtain a search warrant of the home of any person who had a police record as long as the items sought could be evidence of a similar offense. Under this concept, one arrested for receiving stolen property twenty or thirty years ago would be fair game to have his house searched whenever a burglary, robbery, or larceny occurred in his community. Additionally, one arrested for counterfeiting at some time in the past could expect a search of his home whenever counterfeit bills appeared in his community.

In Spinelli v. United States, 393 U.S. 410, 414, 21 L.Ed.2d 637, 89 S.Ct. 584, the FBI asserted that Spinelli was known as a gambler and an associate of gamblers which circumstance "is but a bold and unilluminating assertion of suspicion, that is entitled to no weight in appraising the magistrate's decision. Nathanson v. United States, 290 U.S. 41, 46, 78 L.Ed. 159, 54 S.Ct. 11 (1933)."

May the fact of a police record be added to the fact of the possession of incriminating photographs constitute a probable cause to issue a search warrant. In Spinelli v. United States, supra, page 419, the court stated with reference to Spinelli's reputation as a known gambler:

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> "But just as a single assertion of police suspicion is not itself a sufficient basis for a magistrate's finding of probable cause, we do not believe it may be used to give additional weight to allegations that would otherwise be insufficient."

In discussing the test for probable cause, the court in Wilson v. California, 256 Cal.App.2d 411, 64 Cal. Rptr. 172 (1968), cert. den., 391 U.S. 903, 20 L.Ed.2d 418, 88 S.Ct. 1653, stated:

> "It has been said that the test is whether or not the magistrate could form a reasonable belief, based on the information contained in the affidavit that the articles sought were present at the place to be searched."

Further, in North Carolina v. Campbell, supra, at page 755, the court states:

> "Probable cause as used in the Fourth Amendment . . . means a reasonable ground to believe the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971)."

North Carolina v. Campbell, supra, then reviews the requirements of the affidavit to show probable cause, recites

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the affidavit which appears much stronger than the one in petitioner's case, and at page 756, 757, states:

> "Tested by the constitutional principles stated above, the affidavit in this case is fatally defective. It details no underlying facts and circumstances from which the issuing officer could find that probable cause existed to search the premises described. The affidavit implicates these premises solely as a conclusion of the affiant. Nowhere in the affidavit is there any statement that narcotic drugs were ever possessed or sold in or about the dwelling to be searched. Nowhere in the affidavit are any underlying circumstances detailed from which the magistrate could reasonably conclude that the proposed search would reveal the presence of illegal drugs in the dwelling. The inference the State seeks to draw from the contents of this affidavit--that narcotic drugs are illegally possessed on the described premises--does not reasonably arise from the facts alleged. Therefore, nothing in the foregoing affidavit affords a reasonable basis upon which the issuing magistrate could conclude that any illegal possession or sale of narcotic drugs had occurred, or was occurring, on the premises to be searched.
>
> "Nowhere has this Court or the

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United States Supreme Court approved an affidavit for the issuance of a search warrant that failed to implicate the premises to be searched. (citations omitted)"

Evidence obtained in violation of the Fourth Amendment of the Constitution of the United States must be excluded. See Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684. In addition, all evidence which is obtained as an indirect result of such illegal activity, under the doctrine of the "fruit of the poisonous tree" must likewise be excluded. See Staples v. United States, 320 F.2d 817, (CCA 5, 1963).

In this instance the conviction of the petitioner of indictments 2, 4, 5, 7, 8, 21 and 24, was based upon evidence obtained in the search made of petitioner's home on 14 October 1974 or upon investigation generated by reason of the information obtained in that search. Accordingly, these convictions are in violation of the provisions of the Fourth Amendment of the Constitution of the United States and of the law on illegal searches.

B. Certiorari should be granted because the petitioner was punished separately for several offenses arising out of a single continuous cause of misconduct in violation of the Fifth Amendment to the Constitution of the United States.

For the purpose of punishment, the

offenses involving Cheryl Fortner ought to be considered but a single continuous criminal act culminating in the act of sodomy. The enticement and the exposure were but preludes to and a part of the sodomy as much as trespass, carrying a concealed weapon, assault and larceny are often acts of criminal misconduct leading up to and a part of armed robbery. Likewise, one who breaks into a house and steals property after gaining entrance is engaged in a continuous criminal act and may be sentenced for either but not both. See Snead v. Smyth, 273 F.2d 838 (CCA 4, 1959) where the court in considering a conviction of statutory housebreaking and larceny from the house broken into stated as page 840:

> ". . . an indictment may charge both statutory house breaking and larceny in the same count and that the defendant may be convicted and sentenced thereunder for either crime, but not for both, so that only one penalty can be imposed."

See also Clark v. Commonwealth, 135 Va. 490, 115 S.E. 704 (1923), Benton v. Commonwealth, 91 Va. 782, 21 S.E. 495, Wesley v. Commonwealth, 190 Va. 268, 56 S.E.2d 362 (1949).

The general rule of law is stated in 21 Am. Jur. 2d, Criminal Law, Section 546, as follows:

> ". . . However, for separate offenses charged in one indictment to carry separate

> punishments, they must rest on distinct criminal acts. If they were committed at the same time and were parts of a continuous criminal act, and inspired by the same criminal intent, they are susceptible of only one punishment."

People v. Bauer, 1 Cal.3rd 368, 461 P.2d 637 (1970) discusses punishment for several offenses arising out of a course of conduct in which burglary, robbery, grand theft, and auto theft were accomplished and stated at page 642:

> "The fact that one crime is technically complete before the other commenced does not permit multiple punishment where there is a course of conduct comprising an indivisible transaction."

It is not contended that the accused could not properly be indicted for the several offenses nor that he could not be found guilty of different offenses arising out of a single transaction. It is contended, however, that for the purpose of punishment the offenses charged in indictments 10, 11, and 12 are but a single course of conduct comprising an indivisible transaction and that punishment therefore should be limited to that for the single most serious criminal conviction. As regards Cheryl Fortner, the judgment of consecutive punishment for a total confinement of thirteen years should be set aside as punishment without due process of law contrary to the Fifth

Amendment of the Constitution of the United States.

It appears from the evidence that the finding of guilty of indictments 2 and 5 involving Penny Jo Fortner arose out of an incident which occurred in the home of the defendant while Barbara Velonza was present. It is contended that for purposes of sentencing these two offenses constitute but a single continuous criminal act and the punishment for the conviction of indictment 5, exposure, should be set aside as punishment without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

Therefore, petitioner respectfully requests that a writ of certiorari issue to the Supreme Court of Virginia.

ROBERT CASPER BISPING

By
Of Counsel

LOUIS B. FINE and
LEWIS ALLEN, of
Fine, Fine, Legum and Fine
720 Law Building
Norfolk, Virginia 23510

Attorneys for Petitioner

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 2nd *day of* January, 1976.

The petition of Robert Casper Bisping for a writ of error and supersedeas to judgments rendered by the Circuit Court of the City of Norfolk on the 24th day of June, 1975, in prosecutions by the Commonwealth against the said petitioner for felonies (Indictments Nos. 2, 4, 5, 7, 8, 10, 11, 12, 14, 15, 16, 21 and 23), having been maturely considered and a transcript of the record of the judgments aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgments complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgments of the said circuit court.

A Copy,

Record No. 751273

Teste:

Howard G. Turner, Clerk

By: Allen L. Lucy

Deputy Clerk